IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSEMARIE BARNES and WILLIAM BARNES, Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 01-5766
MAUMEE EXPRESS, INC. and JERRY MITCHELL, Defendants.	:	

O R D E R

AND NOW, this day of January, 2003, upon consideration of the Complaint and Answer filed in this matter, it is hereby ORDERED and DECREED that Defendants' purported "Crossclaim," as set forth in the Answer of Defendants to Plaintiffs' Complaint, is DISMISSED WITHOUT PREJUDICE for the following reasons.

Plaintiffs Rosemarie Barnes and Williams Barnes, husband and wife, filed a Complaint in the instant matter in the Court of Common Pleas for Philadelphia County alleging that Mrs. Barnes suffered injuries as a result of an automobile accident on October 29, 1999, which occurred while Mr. Barnes was driving Plaintiffs' car and Mrs. Barnes was a passenger in the car. See Civil Action Complaint ("Complaint") at ¶¶ 6-21. The Complaint alleges that the accident was the result of the negligence of Defendant Jerry Mitchell, who was operating the "18-wheeler" which struck Plaintiffs' car, and Defendant Maumee Express, Inc., the company that owned the "18-wheeler." See id. The Complaint sets forth four counts: Counts I and II are

negligence claims by Mrs. Barnes against Maumee Express, Inc. and Jerry Mitchell, respectively; and Counts III and IV are claims for loss of consortium by Mr. Barnes against Maumee Express, Inc. and Jerry Mitchell, respectively. See id. at ¶¶ 8-29. After Defendants removed the action to this Court, Defendants filed an Answer generally denying the allegations in the Complaint and asserting various affirmative defenses. See Answer of Defendants to Plaintiffs' Complaint ("Answer") at 1-2. Defendants also set forth a separate claim, designated as a "Crossclaim," alleging that Mr. Barnes' own negligence caused the automobile accident and asserting a claim for contribution and/or indemnity against Mr. Barnes. See id. at 2.

Defendants' purported "Crossclaim" for contribution and/or indemnity must be dismissed. Initially, Defendants' claim for contribution and/or indemnity is incorrectly designated as a "Crossclaim." The claim is against Mr. Barnes, who is a plaintiff and an adverse party, and the claim is therefore an attempt to assert a counterclaim rather than a crossclaim. See, e.g., Stahl v. Ohio River Co., 424 F.2d 52, 55 (3d Cir. 1970) (explaining that cross-claims are filed against co-parties rather than adverse parties, and are litigated by parties on the same side of the main litigation, while counterclaims are litigated between opposing parties to the principal action) (citing Fed. R. Civ. P. 13).

Although Defendants seek to assert a counterclaim for contribution and/or indemnity against Plaintiff Mr. Barnes, a defendant is not permitted to assert a counterclaim against a plaintiff until such claim has matured, and a claim for contribution or indemnity does not mature until there is a final adjudication of the party's liability and the party has paid more than his pro rata share of the judgment. See id. at 55 & n.3 (citing Fed. R. Civ. P. 13). Until such time, a claim for contribution or indemnity is considered to be "contingent," and the only procedure by

which an original defendant is permitted to assert a contingent claim (such as a claim for contribution or indemnity) is by bringing into the suit "a person not a party to the action who is or may be liable to him," pursuant to Fed. R. Civ. P. 14(a). Since Mr. Barnes is already a party to the action, Defendants cannot employ this procedure.

Although it would appear at first blush that Defendants are, therefore, placed in an impossible situation, it is actually well-established in numerous cases that a defendant in precisely these fairly common circumstances may sever the claims of the two plaintiffs pursuant to Fed. R. Civ. P. 21 and then join the plaintiff, against whom a claim for contribution or indemnity is sought to be asserted, as a third-party defendant pursuant to Fed. R. Civ. P. 14. See id. at 55 (citing Slavics v. Wood, 36 F.R.D. 47 (E.D. Pa.1964) and Sporia v. Pennsylvania Greyhound Lines, 143 F.2d 105 (3d Cir. 1944)); see also, e.g., Haschak v. National R.R. Passenger Corp. (AMTRAK), 1999 WL 98570 (E.D. Pa. 1999); Singh v. Daimler-Benz, AG, 1992 WL 168169 (E.D. Pa.); Frankenfield v. Guardian Life Ins. Co., 1991 WL 257084 (E.D. Pa.); Kendra v. Clark Equipment Co., 1986 WL 814 (E.D. Pa.). In other words, Defendants here could have properly sought to sever the claims of Mr. and Mrs. Barnes, and to then join Mr. Barnes as a third-party defendant in the action by Mrs. Barnes against Defendants.

Although Defendants could have taken such steps to rectify their improperly asserted "Crossclaim" against Mr. Barnes at any time since filing their Answer, they did not. Moreover, allowing Defendants an opportunity to do so at this late date would be inappropriate. Local Rule of Civil Procedure 14.1 provides that "[a]pplications pursuant to Fed. R. Civ. P. 14 for leave to join additional parties after the expiration of the time limits specified in that rule will ordinarily be denied as untimely unless filed not more than ninety (90) days after service of the moving

party's answer." Here, Defendants filed their Answer on November 20, 2001, well over a year ago. In addition, a motion to sever and to join Mr. Barnes as a third-party defendant at this late date would be particularly untimely and prejudicial to Plaintiffs given that (1) the parties have recently entered into a "Joint Tortfeasor Release" by which Plaintiffs have agreed to release Defendants from liability for any and all injuries and damages arising from the automobile accident in question, and that (2) as a result, the Court intends shortly hereafter to enter an Order directing the Clerk of Court to dismiss with prejudice all of Plaintiffs claims against Defendants pursuant to Local Rule of Civil Procedure 41.1(b).

Under these circumstances, dismissal of Defendants' claim for contribution and/or indemnity is proper. See Singh, 1992 WL 168169, at *1-2; Kendra, 1986 WL 814, at *1-2. The Court notes that this dismissal in no way prejudices Defendants' ability to seek contribution and/or indemnity from Mr. Barnes via a separately-filed cause of action. See, e.g., Lang Tendons, Inc. v. Great Southwest Marketing Co., Inc., 1994 WL 159014 (E.D. Pa.); Besser Co. v. Paco Corp., 671 F.Supp. 1010 (M.D. Pa. 1987).

BY THE COURT:

Legrome D. Davis